

Moon Equipment Company and Edward H. Hoff.
Case 9-CA-16323

June 30, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND HUNTER

On March 4, 1982, Administrative Law Judge Martin J. Linsky issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions¹ and brief and has decided to affirm the rulings, findings,² and conclusions of the Administrative Law Judge and to adopt his recommended Order, except as modified herein.³

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Moon Equipment Company, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(d) and reletter the present paragraphs 2(d) and (e) as 2(e) and (f).

"(d) Expunge from Edward H. Hoff's personnel record, or other files, any reference to his dis-

¹ Respondent has excepted to the Administrative Law Judge's failure to make a credibility resolution on employee Fields' testimony of what occurred on November 11. Since the Administrative Law Judge credited Hoff's version of what was said, the Administrative Law Judge has implicitly discredited Fields' version to the extent the two are inconsistent. Furthermore, since Fields specifically testified that Hoff told him he was fired, Fields' testimony corroborates that of Hoff. The rest of Fields' testimony is not material to the issue of whether Hoff quit or was discharged.

² Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

³ We find it will effectuate the purposes of the Act to require Respondent to expunge from Hoff's personnel record, or other files, any reference to his unlawful discharge and to notify him that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel action against him. We shall modify the Administrative Law Judge's recommended Order and notice accordingly. See *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

charge on November 11, 1980, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel action against him."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge employees because they have engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Edward H. Hoff full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

WE WILL make Edward H. Hoff whole for any loss of earnings he may have suffered because of the discrimination against him, plus interest.

WE WILL expunge from our files any reference to the discharge of Edward H. Hoff on November 11, 1980, and WE WILL notify him that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel action against him.

MOON EQUIPMENT COMPANY

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge: This case was heard before me in Cincinnati, Ohio, on November 19, 1981. The complaint in this matter was issued by the Regional Director for Region 9 on March 10, 1981, based on a charge filed by Edward H. Hoff on January 15, 1981. The complaint alleges that Moon Equipment Company (herein Respondent) violated Section 8(a)(1) of the National Labor Relations Act (herein the Act) when it discharged Edward H. Hoff, the Charging Party, on November 11, 1980, because Hoff had concertedly complained to Respondent regarding wages, hours, and working conditions on November 10, 1980.

Respondent denies that it violated the Act and argues that Hoff did not engage in protected concerted activity

on November 10, 1980, and, in any event, Hoff quit on November 11, 1980, and was not discharged.

Upon consideration of the entire record, to include post-hearing briefs filed by the General Counsel and Respondent, and upon my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Ohio corporation with an office and place of business in Cincinnati, Ohio, has been engaged in the sale, service, and repair of commercial turf equipment of industrial vehicles and related equipment.

During the fiscal year ending September 30, 1980, Respondent, in the course and conduct of its operations described above, purchased and received at its Cincinnati, Ohio, facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Ohio.

Respondent, by its own admission, is now, and has been at all material times herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

It is uncontested that on the afternoon of November 10, 1980, a conversation was held between the Charging Party, Edward H. Hoff, a mechanic, and Gene Neltner, vice president and service manager for Respondent. They were the only parties to the conversation. There is a dispute as to the subject matter of their conversation. Hoff maintains that on behalf of himself and Charles Fields, the only other mechanic employed by Respondent, he asked for a wage increase, and on behalf of all of Respondent's employees he asked for a better hospitalization plan and that the day after Thanksgiving be declared a company holiday. Hoff claims that he had discussed these matters with Fields beforehand and that he was speaking on behalf of himself and Fields when he spoke to Neltner. Hoff stated that his conversation with Neltner lasted approximately 1-1/2 hours and Neltner told him he would think it over and get back to Hoff the next day. If Hoff's testimony is credited then the conversation with Neltner on November 10, 1980, was protected concerted activity under Section 7 of the Act and Hoff could not be discharged because he spoke with Neltner and complained about wages and other terms and conditions of employment on behalf of himself and others. *Fairmont Hotel Company*, 230 NLRB 874 (1977).

Neltner's version of the November 10, 1980, conversation with Hoff is substantially different from Hoff's version. Neltner claims that the conversation was approximately 30 minutes in length rather than 1-1/2 hours and that Hoff did not mention anything about Respondent getting a better or different hospitalization plan although he had asked about that in the past, nor did Hoff say anything about the day after Thanksgiving being declared a company holiday. Rather, Neltner claims, Hoff merely complained about his own annual raise which he had received some 2 months before and, according to Neltner, Hoff was merely seeking a raise for himself.

Neltner pointed out that Hoff had complained only on behalf of himself about his annual raises in 1978 and 1979 and that he had been given an extra raise although no one else in the Company received a second raise in those years. Neltner said he told Hoff that he would have to think it over and would let him know if anything could be done. If Neltner's version of the conversation is credited then Hoff was not engaged in protected concerted activity under the Act but was merely acting individually. *National Wax Company*, 251 NLRB 1064 (1980).

For the reasons stated below I credit the testimony of Edward H. Hoff and therefore conclude that he was engaged in protected concerted activity on November 10, 1980.

Charles Fields, the other mechanic, testified at the hearing. Fields is a young man and the father of twins who were born shortly after Hoff's employ with Respondent was terminated on November 11, 1980. He is still employed by Respondent as one of two mechanics, Hoff having been replaced in late November 1980. Fields was subpoenaed to the hearing by the General Counsel but the General Counsel did not call him as a witness. After the General Counsel rested his case Respondent called Fields as a witness. During his testimony Fields acknowledged that, although requested to come to the office of the General Counsel prior to the hearing to prepare for this hearing, he did not do so. Fields further acknowledged that he drove to the hearing with Paul Mul-lucey, president of Respondent, and Gene Neltner, vice president and service manager of Respondent. It was apparent to me that the last place in the world Fields wanted to be on November 19, 1981, was on the stand as a witness during the hearing of this matter. Fields testified that, although he had discussed on occasions with Hoff the subject matter of wages, group hospitalization plans, and company holidays, he did not authorize Hoff to speak on his behalf with management concerning those subjects on November 10, 1980. I do not credit this portion of his testimony.¹ He was less than a candid witness who was afraid of death of offending Respondent and possibly placing his job in jeopardy. I do not find that Fields was threatened in any way by Respondent or justified in feeling the way he did but I find that his state of mind was as just described.

Hoff admitted that in 1978 and 1979 he complained about his annual raise as soon as he was told what it was and that he was given a second raise in each of those years. The record reflects that no other employee received a second raise in those years. However, the circumstances existing in 1978 and 1979 were different in 1980. In 1978 and 1979 Respondent gave out its annual raise at the scheduled time; namely, the beginning of June. Hoff almost instantaneously upon receiving notice of the amount of his raise complained to his immediate supervisor, who in turn went to see Neltner, and an extra raise was approved. Further, Respondent was a larger company in 1978 and 1979. Prior to September 26, 1980, Respondent, in addition to selling, servicing, and repairing commercial turf equipment, which it continues to do,

¹ I specifically find that Fields authorized Hoff to speak to management concerning wages on November 10, 1980.

also was engaged in the sale and servicing of forklift trucks and other related products. That latter part of its operation was sold in September 1980. The practical effect of the sale in terms of mechanics was that their number declined from 12 in September 1980 just prior to the sale to just 2 after the sale. The two were Charles Fields and Edward Hoff. In addition to Hoff and Fields, Respondent employed an additional 13 persons. The annual raise due in June 1980 was delayed and not given until September 2, 1980, and it was not until November 10, 1980, that Hoff spoke with Neltner. Lastly, just because a person complains about wages as an individual on two occasions does not mean that he or she could not complain concertedly about wages and other terms and conditions of employment on a third occasion.

Having decided that Hoff engaged in protected concerted activity on November 10, 1980, the next issue to decide is whether Hoff was discharged on November 11, 1980, because he engaged in the aforementioned activity as the General Counsel maintains, or did he quit his job as Respondent maintains. If the General Counsel is correct then Hoff is entitled to relief but if Hoff quit then the complaint in this case should be dismissed in its entirety. I find that Hoff was discharged on November 11, 1980, because of his protected concerted activity on November 10, 1980. I credit the testimony of Hoff. Hoff testified that when he arrived at work on the morning of November 11, 1980, he saw Neltner and Fields talking. It appeared that Neltner was angry because he was right up close to Fields' face. Neltner was standing and Fields was sitting on a stool. Neltner turned and said to Hoff that he had thought over what Hoff had said the day before and Neltner further said, "I want you to get out of here." Hoff said, "Well, are you firing me?" Neltner did not answer but walked back toward Fields. Neltner told Fields that he had a choice, he could either stay or get out. Neltner then turned toward Hoff, who had approached Neltner and Fields, and Neltner said to Hoff, "But you don't have a choice, you get out." Hoff backed his car into the shop area, packed up his belongings, to include a tool chest, and left. Fields asked Neltner if he could help Hoff get his belongings together and Neltner gave him permission to do so.

Neltner's version of the events on the morning of November 11, 1980, was different. Neltner testified that he was chatting with Fields about how Fields' wife was doing since she was expecting to give birth shortly. When Hoff came in Neltner testified that he said to him, "I cannot meet your demands," and, "We have to resolve the differences so that we were good—we stay, you know, compatible, and you want to work, and I want to be happy, and we've got two-three people in the shop, and we have to be, you know, work together." Neltner testified that Hoff then asked, "Well, am I fired?" Neltner then said, "No, you are not, but we do have to come to grips with these problems." This was followed by silence. Neltner did not remember what Hoff then said but Neltner said, "We have to—you have to want to cooperate with me." According to Neltner, he and Hoff then looked at one another and Hoff went over to his work area and put down the cover on his toolbox, which, according to Neltner, meant that he was

leaving. Neltner concluded that Hoff had quit. Neltner went back to his office but later saw Hoff back his car into the shop area so he could load up his belongings. Neltner never tried to talk Hoff out of leaving.

As noted above I credit the testimony of Hoff. I do not credit the testimony of Neltner concerning the events of November 11, 1980.

Charles Fields testified that on the morning of November 11, 1980, he was talking with Neltner when Hoff came in the shop. Although Neltner testified that he and Fields were talking about Fields' wife, Fields testified that Neltner was telling him that now that the Company was split that everyone was going to have to work hard to get what was left of the Company off the ground. When Hoff came in Neltner turned to him and "said that he couldn't meet his demands." Fields testified that he then went to turn in his daily worksheet and heard no more of the conversation between Neltner and Hoff. Fields testified that when he returned and saw that Hoff was leaving Hoff told him he had been fired.²

If one thing became crystal clear during the hearing it was Hoff's preoccupation with security; e.g., he was greatly concerned about the hospitalization plan and feared an illness that could wipe him out financially. This facet of Hoff's personality leads me to believe together with his demeanor that he would not quit Respondent's employ unless he had another job lined up and when he left Respondent's employ on November 11, 1980, he did not have another position lined up and was unemployed for the next 6 months until he found another job.

If Neltner's version of the events on the morning of November 11, 1980, were true then Neltner would have tried to tell Hoff he was crazy for leaving and should not quit. Since I credit Hoff's testimony and since it was conceded by Respondent that Hoff was a competent worker the timing of Hoff's discharge the day after he concertedly complained about wages and other terms and conditions of employment is most persuasive in establishing that he was discharged because of his activity on November 10, 1980. *Portsmouth Lumber Treating, Inc.*, 248 NLRB 1170 (1980).

While Neltner never said, "You are fired" or "You are discharged" to Hoff, the law is clear that such formal words of discharge are unnecessary in order to find that a person was discharged or fired. *Ridgeway Trucking Company*, 243 NLRB 1048 (1979). The words used by Neltner would reasonably lead an employee to believe he had been discharged; i.e., "You get out."

After Hoff's employment which Respondent terminated, Hoff filed for unemployment compensation and Respondent was queried by authorities as to whether Hoff

² Marian Sedler testified for Respondent. A 16-year veteran with Respondent, she has been a receptionist for Respondent for the last 2 years. She testified that Hoff spoke with her on November 11, 1980, and told her he had quit. Hoff denied even talking with Sedler on November 11, 1980. I do not give any weight to Sedler's testimony on this point because it was not until November 17, 1981 (more than a year after the statement was allegedly made), that Sedler first told anyone in management about it, and Sedler did not remember anything else that was said by Hoff, did not know if she had more than one conversation with Hoff that day or not, did not know where at the Company's facility Hoff had made the statement, and did not know what time of day the statement was made or even if it was before or after lunch.

quit or was fired. Respondent stated that Hoff had quit his job. Thereafter, hearings were held within the Ohio Bureau of Employment Services and an appeal was made to a board of review within that Bureau. The decision of the Ohio Bureau of Employment Services was that Hoff had quit his job on November 11, 1980, and that he had spoken on behalf of himself and another employee to Neltner on November 10, 1980, concerning salaries and benefits (protected concerted activity). The findings of the Ohio Bureau of Employment Services are not binding on me and my findings are based on the other evidence of record in this matter. *Newport Window Cleaning Co., Inc.*, 170 NLRB 1221 (1968); *The Sun Company of San Bernardino, California*, 105 NLRB 515 (1953).

THE REMEDY

Since I find that Edward H. Hoff was discharged because he engaged in protected concerted activity I will recommend that he be reinstated. I will also recommend that he receive backpay from November 11, 1980, the date of his unlawful discharge, to date. I will also recommend the posting of an appropriate notice.

CONCLUSIONS OF LAW

1. Respondent Moon Equipment Company is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging Edward H. Hoff because he engaged in protected concerted activity under Section 7 of the Act, Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent has not otherwise violated the Act.

Upon the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³

The Respondent, Moon Equipment Company, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall:

³ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and

1. Cease and desist from:

(a) Discharging employees because they have engaged in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to Edward H. Hoff full reinstatement to his former position or to a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

(b) Make Edward H. Hoff whole for any loss of pay he may have suffered by reason of Respondent's discrimination against him by payment to him of a sum of money equal to that which that employee normally would have earned as wages from November 11, 1980, less net earnings during such period, with backpay to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977) (see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)).

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post copies of the attached notice marked "Appendix."⁴ Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁴ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."